(3)

88-1580-1

No. 88-1580

Supreme Court, U.S.
FILED
APR 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

DEL PERCIO, INC., et al.,

Petitioners,

v.

CITY OF DAYTONA BEACH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OFFICE OF THE CITY ATTORNEY
THE CITY OF DAYTONA BEACH
301 South Ridgewood Avenue
P.O. Box 551
Daytona Beach, Florida 32015

FRANK B. GUMMEY, III
City Attorney
Counsel of Record

MARIE HARTMAN
Assistant City Attorney

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

350P

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by Petitioners contain factual statements unsupported by the record and contrary to the trial court's findings of fact. Respondent would state the questions as follows:

1. Is a city's adult entertainment zoning ordinance, which provides a limited number of potential sites for the location of sexually oriented businesses, an unconstitutional restriction of First Amendment activities where the ordinance is part of a bona fide redevelopment program in a blighted urban area which was enacted to minimize the secondary effects of such businesses and there has been no showing that the sites are inadequate to meet the demand for such uses in the community?

2. Absent evidence that the wording of an adult business zoning ordinance has actually resulted in any deprivation of First Amendment rights, does the language of the ordinance meet constitutional requirements where it has a commonly accepted meaning although not defined with mathematical precision within the ordinance itself?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 1
SUMMARY OF THE ARGUMENT 9
ARGUMENT SUPPORTING DENIAL OF THE WRIT 10
CONCLUSION 20
APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Bose Corp. v. Consumers Union of U.S., Inc. 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) 8

Christy v. City of Ann Arbor 824 F.2d 489 (6th Cir. 1987) *cert. denied*, ___ U.S. ___, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988) 14

City of Daytona Beach v. Del Percio 476 So.2d 197 (Fla. 1985) 3

City of Renton v. Playtime Theatres, Inc. 475 U.S. 41, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986) 8, 10

Davison v. State 288 So.2d 483 (Fla. 1973), *appeal denied*, 415 U.S. 943, 94 S.Ct. 1463, 39 L.Ed.2d 560 (1974) 15

FW/PBS, Inc. v. City of Dallas 837 F.2d 1298 (5th Cir. 1988), *cert. granted*, ___ U.S. ___, 109 S.Ct. 1309 (1989) 14, 15

International Food & Beverage Systems v. Fort Lauderdale 794 F.2d 1520 (11th Cir. 1986), *on remand*, 664 F.Supp. 482 (S.D.Fla. 1987) 11, 12

SDJ, Inc. v. City of Houston 837 F.2d 1268 (5th Cir. 1988), *cert. denied, sub. nom. M.E.F. Enterprises, Inc. v. City of Houston*, ___ U.S. ___, 109 S.Ct. 1310 (1989) 14, 15

Walnut Properties, Inc. v. Whittier 808 F.2d 1331 (9th Cir. 1986); 861 F.2d 1102 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 57 USLW 3653 (1989) 12

Young v. American Mini Theatres, Inc. 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) 10, 11, 17

TABLE OF AUTHORITIES–Continued

Page

STATUTES AND RULES

§847.013, *Fla. Stat.* (1985) 7, 15

11th Cir. R. 36-1 8

OTHER AUTHORITIES

Annotation, Zoning – Delegation of Authority, 58 A.L.R.2d 1083 18

§§301.1(1), 302.1, *BOCA National Building Code 1987*, 10th Edition, Building Officials & Code Administrators International, Inc. 16

§8-1.3, *Life Safety Code*, 1988 Edition, National Fire Protection Association, Inc. 16

§404.1.2, *Standard Building Code*, 1988 Edition, Southern Building Code Congress International, Inc. 16

§402, *Uniform Building Code*, 1988 Edition, International Conference of Building Officials 16

No. 88-1530

In The

Supreme Court of the United States

October Term, 1988

DEL PERCIO, INC., et al.,

Petitioners,

v.

CITY OF DAYTONA BEACH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case is riddled with gross omissions and inaccuracies which have the effect of misinforming this Court as to the true basis of the rulings below.

Respondent, The City of Daytona Beach, is a Florida municipal corporation established in 1925 by the consolidation of three existing small cities. At the time petitioners filed their complaint, the City had an approximate

population of 59,000 and a land area of approximately 31.5 square miles.

Contrary to petitioners' statement of fact, the record does not provide any evidence as to whether "an average mix of residential, commercial and industrial uses [exists], and entertainment plays a large role in the City's economy." The record does contain evidence, which is summarized in the trial court's Order under the heading "Findings of Fact," that the City is far from average. The court found that Daytona Beach is "an unusual Florida city" because it is an older community suffering from many of the problems found in much larger northern cities such as old housing stock, an inability to attract new development, and a blighted core area. In 1981 the City did a study which resulted in the designation of two central areas of blight and a comprehensive program of redevelopment was undertaken.

This redevelopment program, which is the bedrock upon which the challenged zoning ordinance was enacted, tried, and upheld, is not even mentioned by petitioners before this Court.

The numerous steps taken by the City toward the goal of redevelopment are discussed in detail in the record, including such measures as local and state designations of blighted areas, creation of new zoning districts and regulatory boards, extensive financial investments by the City in infrastructure renovation, and institution of mandatory property maintenance requirements. The challenged Ordinance No. 81-292, adopted in September 1981, was part of this effort. It provides that adult theaters and bookstores shall be permitted as a matter of right

in BA zoning districts provided certain objective spacing limitations are met. No special approval is required in BA districts. The ordinance additionally provides for location in other zoning districts by special exception granted by the City Commission based upon specific findings. A ten year amortization period is provided for the abatement of existing nonconforming uses. The definition of adult theater encompasses the presentation of topless and nude dancers.

In October 1981, the City enacted Ordinance No. 81-334 which prohibited nude or semi-nude activity in establishments serving alcoholic beverages.

For some years prior to the enactment of the ordinances, petitioners owned and operated nightclubs in the City which served alcoholic beverages and featured topless dancers. None of their establishments was in a BA zoning district. Except for a six month period in 1983 when the Red Garter Club (one of petitioners' businesses) was involuntarily closed due to drug law violations, petitioners elected to continue serving alcohol in their establishments. Consequently, they voluntarily abandoned their nonconforming uses as adult theaters.

In late 1985 and early 1986, after the Florida Supreme Court had upheld Ordinance No. 81-334 against constitutional challenges, *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985), petitioners made some inquiries to the City concerning a desire to cease serving alcohol at their businesses and begin the presentation of nude entertainment. The City replied that the businesses were not in the proper zoning district for that use. None of the

petitioners requested a special exception under the waiver provisions of Ordinance No. 81-292.

In February 1986, petitioners filed a Complaint in the United States District Court for the Middle District of Florida seeking preliminary and permanent injunctions against the enforcement of Ordinance No. 81-292, and a declaration that the ordinance is unconstitutional. The court denied preliminary injunction in March 1986, in part on grounds that petitioners had failed to exhaust the administrative remedy of applying for an exception.

A bench trial was held in June 1987. At trial petitioners acknowledged they still had made no effort to apply for an exception. They did not present any evidence that they had attempted to locate anywhere in the City other than on the sites currently occupied by their bars. The only competent evidence[1] before the court as to opportunities for adult theaters to locate or relocate after amortization was that the ordinance, when applied by the City's zoning official to existing zoning and uses, provided twelve new sites within the City and that eight of these could be used concurrently.

Petitioners state there was "no dispute" at trial as to the vagueness of the ordinance. In support of this factual statement, petitioners quote extensively from the trial testimony of Fred Holmes, a City zoning official. Several

---

[1] Petitioners presented the testimony of a private investigator that, in his opinion, the twelve sites designated by the zoning official did not meet the criteria of the ordinance. The court rejected his opinion based on the witness's lack of expertise or knowledge in the application of the City's zoning ordinance.

pages are devoted to Mr. Holmes' testimony regarding the interpretation of "public or semi-public place o[f] assembly where large numbers of minors travel or congregate". In sum, he testified that he utilized a definition of this term contained in the Life Safety Code also adopted by the City, and that provision was included in the record.

With respect to the term *adult theater*, petitioners set forth the following excerpt from Mr. Holmes' testimony under cross-examination:

> Q. Would it matter to your office if the totally nude entertainment was not harmful to minors?
>
> A. I don't know what harmful to minors would be. I'm not an expert in that field.
>
> Q. In fact, Mr. Holmes, is it not your opinion that any exposure of the female breast is activity which is harmful to minors?
>
> A. No.
>
> Q. Is any exposure of the human female breast in connection with a stage performance adult entertainment?
>
> A. Yes.

Petitioners did not provide the Court with the remainder of that exchange, which continues:

> Q. And that in and of itself requires the business to be in a BA zone?
>
> A. Yes.
>
> Q. Regardless of how short a duration the exposure takes? Say five seconds?
>
> A. *If it's billed primarily as adult entertainment*, it would be considered – (emphasis supplied)

In order to fairly understand Mr. Holmes' testimony, the following should also be considered:

> (Still under cross-examination)
>
> Q. When you made determinations in the past as to whether a business was or was not an adult theater for purposes of this ordinance, did you do so based on that language [definition of adult theater contained in the ordinance]?
>
> A. You implied that I made them in the past and I haven't because no one has ever requested or told me what they intended to do.
>
> Q. Are you saying you have never had a formal application submitted?
>
> A. Never had a formal application submitted, yes, sir.

Counsel then questioned Mr. Holmes about his written response to a letter from the attorney for the Shingle Shack, one of petitioners' businesses. The letter requested licensing information for a business described as presenting "nonobscene constitutionally protected striptease and nude female dancers". Mr. Holmes had indicated that "adult theater zoning" was required:

> Q. And where did you get the – How did you make the decision that they weren't [permitted to operate in the zoning district]?
>
> A. Nude female dancers.
>
> Q. Okay. And that's all it took in your mind, is that correct?
>
> A. That's correct.
>
> Q. And it didn't make any difference to you if the nudity was harmful to minors, correct?

A. I don't have any idea what might be harmful to minors.

The ordinance defines adult theater as a use exhibiting "nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and is harmful to minors, *all as defined in 847.013, F.S.*, as may be amended, and admission of minors to which is unlawful in accordance with 847.013, F.S., as may be amended." (emphasis supplied) Section 847.013(1), *Fla. Stat.*, provides definitions of "nudity", "sexual conduct", "sexual excitement", and "sadomasochistic abuse" in paragraphs (a) through (e), and a defintion of "harmful to minors" in paragraph (f). Appendix B.

In their petition to this Court, petitioners make other claims which are entirely outside the trial record, flagrant distortions of fact, or outright lies. These claims are an undisguised effort to attack evidence as to the City's goals and commitment to redevelopment, which petitioners did not even attempt to refute at trial. After thoroughly examining the record, the City advises this Court that there is absolutely no record evidence or inference of any sort about the number of alcoholic beverage licenses in the City, about the Daytona International Speedway, Spring Break, or Bike Week. In particular, petitioners' claim that the City opens its arms to an annual gathering of "thousands of 'Hell's Angels' motorcyclists" is patently untrue.

There is a report in the record, which pre-dates the adoption of the ordinance, identifying twenty "sexually oriented" businesses existing in 1981. There is no evidence regarding how many of these actually were regulated by the ordinance, or exactly how many have closed.

The evidence was that several of them closed after RICO charges were filed by the State, and that *none of them closed by operation of the ordinance.* Numerous bars, including those of petitioners, which offer "exotic dancers" as entertainment and were among the twenty businesses listed, continue to operate within the City under the regulation of Ordinance No. 81-334 prohibiting nudity in bars.

After hearing the evidence, the District Court issued an unreported opinion finding the ordinance constitutional in all respects. The vagueness challenges were dismissed without comment, except in regard to petitioners' failure to exhaust administrative remedies. The decision was affirmed *per curiam* without opinion by the Court of Appeals for the Eleventh Circuit, citing 11th Circuit Rule 36-1 that an opinion would have no precedential value. *See,* Appendix A.

The ordinance was properly analyzed by the District Court as a time, place, and manner restriction under *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986). Such an ordinance is permissible where it serves a substantial governmental interest and does not unreasonably limit alternative avenues of communication. The trial court found that the ordinance currently provided twelve available sites for the location of adult businesses in the City. The trial court's findings of fact should not be disturbed unless clearly erroneous. *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

SUMMARY OF THE ARGUMENT

I. The standard which an adult business zoning ordinance must meet in order to pass constitutional muster is not whether it leaves the availability of sites "virtually unrestricted" as proposed by petitioners. *Renton* made it clear all that is required is that petitioners not be denied a reasonable opportunity to open and operate an adult theater.

The inquiry under *Renton* as to whether a particular limitation is unreasonable must be made in the context of the conditions which exist in the particular community. The challenged ordinance does have the effect of providing a limited number of sites for the location of adult theaters and bookstores within the City. However, the facts presented to and accepted by the court in this case showed that the City enacted the ordinance as one measure in a comprehensive redevelopment program calculated to combat blight prevalent in the community, and there was no indication that the twelve available new sites would not meet the demands of the community for access to such uses. In light of these facts, the twelve sites available to petitioners are not an unreasonable restriction of their First Amendment rights to present nude entertainment.

II. The ordinance is not vague as applied to these petitioners, and this is not an appropriate case in which to employ the overbreadth doctrine to allow them to litigate the rights of persons not before the court. Petitioners have not been affected by any of the terms which they allege are vague. They propose businesses clearly

within the ordinance's definition of adult theater at locations which are not in permitted zoning districts. They have not attempted to obtain a special exception, the provisions for which are virtually identical to those in the Detroit ordinance which this Court refused to strike down in *Young v. American Mini Theatres*.

Since there is no vagueness in the provisions of the ordinance as applied to these petitioners, they have no standing to raise the issue.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. THE FINDING THAT ORDINANCE NO. 81-292 DOES NOT UNCONSTITUTIONALLY RESTRICT PETITIONERS' FIRST AMENDMENT RIGHTS AND PROVIDES ADEQUATE AND REASONABLE LOCATIONS FOR THE EXPRESSION OF NUDE DANCING WITHIN THE CITY DOES NOT CONFLICT WITH ANY POST-*RENTON* DECISIONS.

This Court first upheld an adult business zoning ordinance in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), where it was determined that zoning ordinances designed to combat the undesirable secondary effects of sexually oriented businesses are to be reviewed as content-neutral time, place, and manner regulations. The test to be applied in analyzing such an ordinance, however, was clearly set out in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), ten years later. There it was held, first, the ordinance must serve a substantial

governmental interest, and second, it must allow for reasonable alternative avenues of communication. *Id.*, at 50, S.Ct. at 930. The Court further announced guidelines in determining the second prong of this test which had not been discussed in *American Mini Theatres. Renton,* at 53-54, S.Ct. at 932.

In attempting to establish conflict certiorari, petitioners cite numerous cases decided by the federal courts after *American Mini Theatres,* but prior to *Renton.* These earlier cases decided without the benefit of *Renton* are of no value in determining conflict.

The Fifth, Sixth, Ninth, and Eleventh Circuits have issued post-*Renton* opinions dealing with the reasonableness of alternative avenues of communication provided by adult business zoning ordinances. A review of these cases does not reveal any clear conflict with the decision which is the subject of this petition.

The District Court's Order upholding the City's ordinance was affirmed without opinion by the appellate court. The District Judge relied almost exclusively on *Renton* and an Eleventh Circuit case, *International Food & Beverage Systems v. Fort Lauderdale,* 794 F.2d 1520 (11th Cir. 1986). *International Food* involved an adult business zoning ordinance in Fort Lauderdale, Florida, a city of 156,000 inhabitants covering 31 square miles. The court found that the ordinance would allow as many as 22 sites and stated:

> We are at a loss how anyone could determine that as many as 22 sites for such bars were not enough, without reference to community needs, the incidence of nude bars in other comparable communities, the goals of the city plan, and the kind of city the plan

> works towards. Justice Rehnquist does not say the city may not "limit alternative avenues of communication," but only that it may not limit them "unreasonably." What is reasonable cannot be ascertained by reference to nothing except the wishes of the nude bar proprietors.
>
> ********
>
> The ordinances here challenged should have been tested by reference to the entire zoning scheme of which they were meant to be a part, not as an isolated whim of the commissioners, ***

Id., at 1526, 1527. The Eleventh Circuit remanded the case to the trial court for reconsideration in light of *Renton*. It was eventually decided on other grounds. *International Food & Beverage Systems v. Fort Lauderdale*, 664 F.Supp. 482 (S.D.Fla. 1987).

The Ninth Circuit, in its first application of *Renton*, made a similar observation concerning the context in which an adult business zoning ordinance should be judged: "The availability of alternative sites must be considered in light of the ordinance's purpose and design". *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1337 (9th Cir. 1986). It, too, ordered remand in light of *Renton*. The case made its way back to the appellate court in 1988, *Walnut Properties, Inc. v. Whittier*, 861 F.2d 1102 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 57 USLW 3653 (1989), and the Ninth Circuit found that the ordinance did deny Walnut a reasonable opportunity to operate its theater within the city.

Walnut invoived an ordinance similar to the City's. The ordinance was dealt with in terms of the number of

sites available for the location of the regulated businesses. While a definite number of sites was not established in the case, the court indicated there were "significantly" less than twelve and probably a range of two to four. *Id.*, at 1109. A second major concern of the court was its understanding that the Whittier ordinance would "force the only existing adult theater in Whittier to close at its present location with no definite prospect of a place to relocate." *Id.*, at 1110. That is not the situation in this case. First, petitioners do not operate adult theaters in the City.[2] They wish to convert their existing bars into

---

[2] Petitioners have at all times operated bars featuring female "exotic dancers" as entertainment. At the time the zoning ordinance was enacted in September 1981, the dancers were performing topless. The topless performances brought their establishments within the definition of *adult theater* in the ordinance. As long as they continued to operate as adult theaters, petitioners' businesses were entitled to remain at their nonconforming locations for the ten year amortization period.

In October 1981 Ordinance No. 81-334 was enacted. This ordinance prohibited nudity in establishments serving alcohol. After the enactment of this ordinance, petitioners chose to continue serving alcohol. By this choice, petitioners abandoned the use of adult theater as defined in the ordinance (or, as petitioners prefer to call it, "adult nightclub"). The zoning ordinance provides that a nonconforming use cannot be reestablished as a matter of right after abandonment for nine months.

If petitioners had chosen, either in October 1981 or any time during the following nine months, to cease serving alcohol and to present nude or topless dancers, they would have been entitled to continue under the amortization provision.

adult theaters. Second, the City's ordinance provides a 10 year amortization period during which any affected establishment may arrange for relocation or waiver. Third, there are currently twelve available sites within the City which would accomodate the proposed use as compared to between two and four in Whittier. Petitioners did not establish any impediment to the location of their proposed businesses on the available sites, only that they wished to establish them at the sites of their existing bars. And finally, the Whittier ordinance was not supported by the kind of evidence offered by the City here regarding its extensive redevelopment project.

The Sixth Circuit case, *Christy v. City of Ann Arbor*, 824 F.2d 489 (6th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), was also remanded. The trial court had relied primarily on the ordinance's application only to businesses with more than 20 percent adult wares in holding that the ordinance was "not greatly restrictive of first amendment rights". *Id.*, at 492. The Sixth Circuit directed the District Court to determine whether the ordinance "severely" restricted expression in terms of the locations available for strictly adult bookstores. *Id.*

The Fifth Circuit has heard two cases raising, *inter alia*, the issue of whether reasonable alternative avenues of communication exist: *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); and *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). In both cases the court found the available sites sufficient to meet *Renton* requirements. The court indicated Houston's ordinance would allow " 'at least 100' and perhaps up to 'tens of

thousands' " of sites in the city. 837 F.2d 1277. The opinion in *FW/PBS* does not specify the number of locations available, only that the ordinance "allows reasonable alternative avenues of communication." 837 F.2d 1303. Petitions for certiorari were filed in both cases on this and other issues. This Court granted jurisdiction in *FW/PBS* only in regard to those issues involving licensing requirements, ___ U.S. ___, 109 S.Ct. 1309 (1989), and denied the petition in *SDJ, sub. nom. M.E.F. Enterprises, Inc. v. City of Houston,* ___ U.S. ___, 109 S.Ct. 1310 (1989).

Upon a review of current reported opinions, it is evident that the District Court's unreported Order in this case, affirmed *per curiam* without opinion by the Eleventh Circuit Court of Appeals, is entirely in accordance with *Renton* and later rendered opinions of the Circuit Courts.

II. THE PROVISIONS OF THE CHALLENGED ORDINANCE ARE SUFFICIENTLY CLEAR AND UNAMBIGUOUS TO MEET CONSTITUTIONAL REQUIREMENTS.

Petitioners attack the terms *adult theater* and *any other public or semi-public place o[f] assembly where large numbers of minors regularly travel or congregate* as being so vague that they render the ordinance unconstitutional.

The definition of *adult theater* in the ordinance incorporates §847.013, *Fla. Stat.*, Appendix B, and provides that it is a use to which admission of minors is unlawful under that state statute. All terms used are specifically defined in §847.013(1). The constitutionality of §847.013 was upheld in *Davison v. State,* 288 So.2d 483 (Fla. 1973),

appeal denied, 415 U.S. 943, 94 S.Ct. 1463, 39 L.Ed.2d 560 (1974).

In support of their contention that *adult theater* is a vague term, petitioners rely on the testimony of Fred Holmes. As set forth in the preceding statement of the case, Mr. Holmes' testimony shows that he never had the opportunity to apply the definition of *adult theater* except in response to an informal request concerning "striptease and nude female dancers". Clearly that description came within the definition. If and when Mr. Holmes is required to make this determination in a less clear case, and not under the pressure of cross-examination, he would be able to avail himself of the normal resources of the City, including legal counsel.

Mr. Holmes testified that he used a definition contained in the City's Life Safety Code to determine the application of the term *any other public or semi-public place of[] assembly where large numbers of minors regularly travel or congregate*. In essence, this language is a trade term with a universally accepted meaning. *See, e.g.*, §§301.1(1), 302.1, *The BOCA National Building Code 1987*, 10th Edition, Building Officials & Code Administrators International, Inc.; §8-1.3, *Life Safety Code*, 1988 Edition, National Fire Protection Association, Inc.; §404.1.2, *Standard Building Code*, 1988 Edition, Southern Building Code Congress International, Inc.; §402, *Uniform Building Code*, 1988 Edition, International Conference of Building Officials; Appendix C-F. Mr. Holmes' interpretation is entirely consistent with the nationally accepted standard in regard to consideration of the building usage and the number of persons being 50. In any event, petitioners' complaint is

that they have not been permitted to establish adult theaters in their current business locations. The reason they cannot do so is that none of these locations is in a BA zoning district. The distance restriction concerning travel or congregation of minors has not been applied to petitioners – they are simply in the wrong districts.

The Supreme Court relegated vagueness challenges raised in *Renton* to a footnote:

> We reject respondents' "vagueness" argument for the same reasons that led us to reject a similar challenge in *American Mini Theatres, supra*. There, the Detroit ordinance applied to theaters "used to present material distinguished or characterized by an emphasis on [sexually explicit matter]." 427 U.S., at 53, 96 S.Ct., at 2444. We held that "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents." *Id.*, at 58-59, 96 S.Ct., at 2446. We also held that the Detroit ordinance created no "significant deterrent effect" that might justify invocation of the First Amendment "overbreadth" doctrine. *Id.*, at 59-61, 96 S.Ct., at 2446-2448.

Renton, 475 U.S. at 55 n.4, 106 S.Ct. at 933.

Petitioners also describe the standards for the City Commission's granting of a special exception as "blatantly unconstitutional", and cite in support cases which deal with the constitutionality of subjecting first amendment activities to a prior restraint. This is not a prior restraint situation.

Petitioners need not meet the criteria of the special exception in order to exercise their first amendment rights to present nude dancing. They may locate their proposed businesses as a matter of right in any one of the

twelve locations found available by the trial court. There is no prior restraint on the expression of nude dancing in the City. It is only if petitioners wish to locate such a business outside of an appropriately zoned area, or contrary to the locational restrictions, that the waiver criteria come into play. The City Commission authorized itself to grant special exceptions in the case of adult theaters as a means of providing additional opportunities for their establishment. The criteria for granting a special exception include required findings that the public interest and the spirit and intent of the ordinance be observed. §§ 51.3 and 51.1, Ordinance No. 81-292, Petitioners' App. A-3,4,5. These are the kind of criteria generally held sufficient to sustain the validity of a special exception provision. Annotation, *Zoning – Delegation of Authority*, 58 A.L.R.2d 1083.

Similar vagueness issues were raised in *Young v. American Mini Theatres, Inc.*: (1) that it could not be determined from the definition how much presentation of sexual activity or exposure would subject a business to the zoning restriction, and (2) that the provisions for obtaining a waiver of the 1,000-foot restriction did not specify adequate procedures or standards. The findings required in the Detroit ordinance before a waiver could be granted were virtually identical to the special exception criteria in the City's ordinance. As is the case here, no attempt had been made to utilize the waiver provision. The Court held:

> We find it unnecessary to consider the validity of either of these arguments in the abstract. For even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents. The record

> indicates that both theaters propose to offer adult fare on a regular basis. Neither respondent has alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater. It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents. To the extent that their challenge is predicated on inadequate notice resulting in the denial of procedural due process under the Fourteenth Amendment, it must be rejected. (footnote ommitted)

Id., at 58-59, S.Ct. at 2446-2447.

In rejecting the respondents' argument that they had standing to raise the vagueness issue under the first amendment overbreadth doctrine, the Court said:

> For most films the question [whether they are subject to the ordinance] will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

Id., at 61, S.Ct. at 2448.

The terms contained in the City's ordinance are sufficiently clear to meet constitutional standards. Furthermore, since petitioners here have not been affected by any alleged vagueness in the City's zoning ordinance, and the alleged vagueness is readily susceptible to a

narrowing construction by the state courts, this argument must be rejected.

CONCLUSION

The rulings below are squarely based on *Renton*, and do not conflict with any decisions of this Court or the Circuit Courts of Appeals.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
THE CITY OF DAYTONA BEACH
P.O. Box 551
Daytona Beach, Florida 32015
(904) 258-3195

FRANK B. GUMMEY, III
City Attorney
Counsel of Record

MARIE HARTMAN
Assistant City Attorney

INDEX TO APPENDIX

A 11th Circuit Rule 36-1 ..... App. 1

B §847.013, *Florida Statutes* (1987) ..... App. 2

C §§301.1(1), 302.1, *BOCA National Building Code 1987*, 10th Edition, Building Officials & Code Administrators International, Inc. ... App. 4

D §8-1.3, *Life Safety Code*, 1988 Edition, National Fire Protection Association, Inc. . App. 5

E §404.1.2, *Standard Building Code*, 1988 Edition, Southern Building Code Congress International, Inc. ..... App. 6

F §402, *Uniform Building Code*, 1988 Edition, International Conference of Building Officials..... App. 7

APPENDIX A

11th Cir.R. 36-1 Affirmance
Without Opinion

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without an error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

* * *

[I.O.P–Opinions.

* * *

3. *Publication of Opinions.*

* * *

Opinions that the panel believes to have no precedential value are not published. All non-published opinions and affirmances without opinion under 11th Cir.R. 36-1 are printed in table form in the Federal Reporter. (See for example 791 F.2d 170). Although unpublished opinions may be cited-as precedent, this is looked upon

with disfavor by the Court. If cited, a copy should be attached to or incorporated within the motion, brief or petition in which such citation is made.

APPENDIX B

§847.013, *Florida Statutes* (1985)

847.013 Exposing minors to harmful motion pictures, exhibitions, shows, presentations, or representations.–

(1) DEFINITIONS.–As used in this section:

(a) "Minor" means any person under the age of 18 years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering; the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation; homosexuality; sexual intercourse; physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast or any act or conduct which constitutes the commission of the abominable and detestable crime against nature or suggests that such crime is being or will be committed.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask, or bizarre costume or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:

1. Predominantly appeals to the prurient, shameful, or morbid interest of minors,

2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, and

3. Is without serious literary, artistic, political, or scientific value for minors.

* * *

(2) OFFENSES AND PENALTIES.–

(a) It is unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly sell to a minor an admission ticket or pass or knowingly admit a minor for a monetary consideration to premises whereon there is exhibited a motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and which is harmful to minors.

APPENDIX C

§§301.1(1), 302.1, *BOCA National Building Code 1987*, 10th Edition, Building Officials & Code Administrators International, Inc.

SECTION 301.0 CLASSIFICATION

301.1 General: All buildings and structures shall be classified with respect to use in one of the use groups listed below.

1. Use Group A assembly (see Section 302.0).
2. Use Group B business (see Section 303.0).
3. Use Group E educational (see Section 304.0).
4. Use Group F factory and industrial (see Section 305.0).
5. Use Group H high hazard (see Section 306.0).
6. Use Group I institutional (see Section 307.0).
7. Use Group M mercantile (see Section 308.0).
8. Use Group R residential (see Section 309.0).
9. Use Group S storage (see Section 310.0).
10. Use Group U utility and miscellaneous (see Section 311.0).

SECTION 302.0 USE GROUP A, ASSEMBLY USES

302.1 General: All buildings and structures, or parts thereof, shall be classified in Use Group A which are used or designed for the gathering together of persons for

purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation. A room or space used for assembly purposes by less than 50 persons and which is accessory to another use group shall be included as a part of that main use group.

APPENDIX D

§8-1.3, *Life Safety Code*, 1988 Edition, National Fire Protection Association, Inc.

8-1.3 Special Definitions.

Assembly Occupancies. Include, but are not limited to, all buildings or portions of buildings used for gathering together 50 or more persons for such purposes as deliberation, worship, entertainment, dining, amusement, or awaiting transportation.

APPENDIX E·

§404.1.2, *Standard Building Code*, 1988 Edition, Southern Building Code Congress International, Inc.

404 ASSEMBLY OCCUPANCY – GROUP A

404.1 Scope

404.1.1 Group A occupancy is the use of a building or structure, or any portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions or for recreation, or for food or drink consumption or awaiting transportation.

404.1.2 Group A occupancy shall include, among others, the following:

Amusement Park Buildings
Auditoriums
Churches
Dance Halls
Gymnasiums
Restaurants that accommodate 50 or more people, or provide dancing or entertainment
Motion Picture Theaters
Museums
Passenger Depots
Public Assembly Halls
Recreation Halls
Stadiums and Grandstands
Tents for Assembly
Theaters for Stage Production

APPENDIX F

§402, *Uniform Building Code*, 1988 Edition, International Conference of Building Officials

* * *

ASSEMBLY BUILDING is a building or portion of a building used for the gathering together of 50 or more persons for such purposes as deliberation, education, instruction, worship, entertainment, amusement, drinking or dining or awaiting transportation.

* * *